

3R MINERALS

IBLA 97-527 & 98-134

Decided April 22, 1999

Appeals from decisions of Area Manager and Acting Area Manager, Escalante Resource Area, Utah, Bureau of Land Management, rejecting plans of operations for mining and mineral exploration within a wilderness study area. UT-049-97-025.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Wilderness--Mining Claims: Plan of Operations--
Wilderness Act

The Secretary of the Interior is required by section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1994), to manage lands under review for wilderness suitability so as to prevent impairment of their wilderness characteristics, subject to grandfathered uses and valid existing rights. Under this standard, a plan of operations for a mining claim located after 1976 is properly rejected if it entails impacts which cannot be reclaimed to the point of being substantially unnoticeable by the time the Secretary is to make his recommendation regarding wilderness designation.

APPEARANCES: Allen K. Young, Esq., Springville, Utah, for 3R Minerals; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by 3R Minerals from a July 24, 1997, Decision Record/Finding of No Significant Impact (DR/FONSI) issued by the Area Manager, Escalante Resource Area, Utah, Bureau of Land Management (BLM). That decision rejected a Plan of Operations (Plan) submitted by appellant on June 27, 1997, for a titanium/zirconium mining operation to be situated in Garfield County, Utah, within the Carcass Canyon Wilderness Study Area (WSA) (UT-040-076). The appeal was docketed as IBLA 97-527. An appeal has also been brought by 3R Minerals from a December 30, 1997,

decision of the Acting Area Manager, Escalante Resource Area, Utah, BLM, rejecting a modified Plan submitted on December 2, 1997, for an exploration operation. The latter appeal was docketed as IBLA 98-134. By Order dated October 14, 1998, we consolidated these two cases and granted 3R Minerals' Motion to Expedite Proceedings.

Appellant initially submitted a Plan in which it proposed to undertake mining operations seeking to recover titanium and zirconium on less than 5 acres of public land within mining claims located September 1, 1996. ^{1/} The location of the operation was described in the Notice of Intention to Commence Small Mining Operations filed with the State of Utah, Department of Natural Resources, Department of Oil, Gas and Mining (DOGMI) as the SW¹/₄NW¹/₄ sec. 17, T. 36 S., R. 3 E., Salt Lake Meridian. Specifically, appellant proposed to surface mine, over a 4-month period, a rectangular area of land about 130 feet by 1,500 feet in size, to a depth of from 15 to 20 feet, on either side of an existing bulldozer cut originally made in connection with construction of the Calf Canyon Road. That cut, which had been made about 2-1/2 miles up the Calf Canyon Road, had exposed the titanium/zirconium ore deposit. Excavation and collection of loose ore material would be done by a dozer/ripper. This material would be taken by a front end loader and passed through a portable primary crusher, and then moved by conveyor and loaded onto trucks. It would then be hauled to a remote processing facility, where it would be processed for the expected recovery of titanium and zirconium. As mining progressed, the area disturbed would be fully reclaimed. Reclamation was to be ongoing to minimize the disturbance. The excavated material would be removed or regraded, to prevent excessive sediment erosion, and, at the end of mining, the sparsely-vegetated area would be replanted.

It appears from the record that the entire area of 3R Minerals' proposed operations is situated within the Carcass Canyon WSA. (Environmental Assessment (EA) at 2.) While the Calf Canyon Road west of section 17 was cherry-stemmed eastward up Calf Canyon to the border of section 17 and thus excluded by BLM from the WSA, BLM reports that the cherrystemming extends only from the road's junction with the Alvey Wash Road east to the western line of sec. 17, T. 36 S., R. 3 E., Salt Lake Meridian, Garfield County, Utah. Id. It thus does not encompass the section of the road which appellant intends to use in conjunction with its operations. Appellant asserts that Calf Canyon Road was constructed and in use prior to designation of the WSA. (Letter to BLM dated June 10, 1997.) Although wilderness and, hence, WSA's, are by definition roadless areas, ^{2/} the determination of

^{1/} The Plan as initially filed identified mining claim UMC-360474. As modified in an amendment to the Plan filed July 20, 1997, the mining claims involved are lode mining claims 3RA Nos. 14 through 16, UMC-360451 through UMC-360453, located on behalf of 3R Minerals on Sept. 1, 1996, and filed for recordation with BLM on Sept. 3, 1996.

^{2/} Section 603(a) of Federal Land Policy and Management Act of 1976, (FLPMA), 43 U.S.C. § 1782(a) (1994).

the boundaries of the WSA was made at the time that the WSA was designated and appellant cannot now appeal the propriety of inclusion of lands in the WSA in the context of an appeal from a decision on its plan of operations. Dave Paquin, 129 IBLA 76, 80 (1994); Ceminex, Ltd., 129 IBLA 64, 73 (1994).

Counsel for appellant has also taken the position before BLM that the Calf Canyon Road to the claims constitutes a right-of-way under R.S. 2477 ^{3/} maintained by Garfield County. See Letters to BLM from Allen K. Young, Esq., dated June 10 and 30, 1997. It appears, however, that BLM disputes this contention. See BLM Letter to Allen K. Young, Esq., dated July 22, 1997, at 1. While this issue may have an effect on appellant's access to the mining claims, it was not addressed in the BLM decisions and is not material to this appeal from rejection of the Plans filed by appellant. To the extent that appellant argues that the existence of a R.S. 2477 right-of-way would make inclusion of that area inappropriate for WSA designation, we must reject as untimely any appeal of the inclusion of the land within a WSA. Dave Paquin, 129 IBLA at 80.

The Carcass Canyon WSA is an area of the public lands containing 5,000 or more acres, which has been determined by BLM to exhibit wilderness characteristics, as defined by section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1994). It is currently being reviewed by Congress for possible designation and protection as a wilderness area, pursuant to the Wilderness Act, as amended, 16 U.S.C. §§ 1131! 1136 (1994). During the period of such review and until Congress either designates the lands or releases them from further consideration, BLM is required to manage the public lands within the WSA in accordance with section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994). Committee for Idaho's High Desert, 139 IBLA 251, 253 (1997); Ronald A. Pene, 135 IBLA 143, 147-48 (1996). This statutory provision requires BLM to manage the lands "in a manner so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. § 1782(c) (1994); Sierra Club v. Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988); Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996). This nonimpairment standard is, however, expressly "subject * * * to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on [October 21, 1976]," i.e., grandfathered uses. 43 U.S.C. § 1782(c) (1994); Committee for Idaho's High Desert, 139 IBLA at 253.

^{3/} Revised Statutes (R.S.) 2477 was originally codified at 43 U.S.C. § 932 (1970) (repealed, effective Oct. 21, 1976, by section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2793, subject to valid existing rights-of-way). The grant of a right-of-way under R.S. 2477 arose when a public highway over unreserved public lands was established pursuant to the laws of the jurisdiction where the land is located. Wilkenson v. Department of the Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986); Leo Titus, Sr., 89 IBLA 323, 335-36, 92 I.D. 578, 586 (1985).

The management of WSA lands by BLM is governed by its Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP). ^{4/} The IMP sets forth certain nonimpairment criteria that are generally designed to ensure that no activity will occur that will jeopardize or negatively affect Congress' ability to find that the WSA has the necessary wilderness characteristics and thus to designate it as wilderness. Committee for Idaho's High Desert, 139 IBLA at 253.

In order to assess the environmental consequences of the proposed Plan and alternatives thereto, including No Action, as required by section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), BLM prepared an EA (UT-049-97-025) on July 24, 1997. Included in the EA was an analysis of whether approving the proposed Plan would impair the suitability of the Carcass Canyon WSA for designation as wilderness. The general impact of the proposed operations on the affected lands was set forth in the EA as follows:

The characteristic landscape is composed of a narrow canyon approximately 1,000 feet wide and ranging from 200 to 600 feet deep. The steep multi-layered sandstone walls of the canyon provide a rugged backdrop to the sandy wash bottom and ledges covered with pinyon, juniper, and ponderosa pine. Much of the route up the canyon is in a natural condition, with no visual remains of human activity. About half of the route from Alvey Wash to the proposed mine site follows the remains of a constructed (cut and fill) road of approximately 8-12 feet wide which parallels the wash. Severe erosion, slumping, and new vegetation growth serve to reduce the contrast of the road with the surrounding landscape although it is still evident. Disturbance at the proposed mine site is minimal and consists of a leveled area and some cutting in the hillside. The existing disturbance would be substantially unnoticeable to the casual observer.

The proposed action as described in the Plan of Operations would have the effect of dominating the view of the casual observer along the entire route up Calf Canyon and especially at the proposed mine site. The narrow width of the canyon and the proximity of the mine site to the stream bed would leave the site exposed to view from any point in the canyon.

(Visual Resource Analysis Attachment for EA UT-049-97-025.)

^{4/} The IMP was first published in the Federal Register on Dec. 12, 1979 (44 Fed. Reg. 72013). It was later amended in ways that are not pertinent to this case (48 Fed. Reg. 31854 (July 12, 1983)), and then incorporated in a Handbook (H! 8550! 1 (Rel. 8! 36 (Nov. 10, 1987))), which was part of BLM's Manual. See Committee for Idaho's High Desert, 139 IBLA at 253 n.3. The current Handbook is H! 8550! 1 (Rel. 8! 67 (July 5, 1995)).

Based on the analysis in the EA, the Area Manager, in his July 1997 DR/FONSI, concluded that approving the proposed Plan would impair the wilderness suitability of the Carcass Canyon WSA and thus was not permitted by the IMP. He reasoned that, since the deadline for the Secretary of the Interior to recommend to Congress whether or not to designate the WSA as a wilderness area had passed, "no actions which would cause [a] surface disturbance may be authorized." (DR/FONSI at 1.) Because he concluded that approving the proposed Plan "would cause [a] surface disturbance," the Area Manager decided not to approve it, and instead to adopt the No Action alternative. Id. An appeal has been brought from that DR/FONSI.

On December 2, 1997, during the pendency of its initial appeal, appellant submitted a modified Plan of Operations pursuant to 43 C.F.R. § 3802.1-4 in which it proposed to undertake exploration operations over a 5-month period, seeking to "evaluate the zircon/titanium bearing sands." This operation was projected to disturb 4 acres of public land also situated in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 17 and encompassed by 3R Minerals' three lode mining claims, 3RA Nos. 14 through 16. Specifically, appellant proposed to drill 12 holes, on either side of the Calf Canyon Road, to a depth of about 30 feet, using a small wheel- or track-mounted drilling rig. As exploration progressed, the area disturbed would be reclaimed.

In his December 1997 decision, the Acting Area Manager concluded that the 12 drill holes would be drilled in the same location as the mining operations originally proposed by appellant. Since the Plan indicated operations would also cause a "surface disturbance," BLM concluded that operations would impair the wilderness suitability of the Carcass Canyon WSA and, hence, were likewise not permitted by BLM's IMP. Accordingly, BLM rejected appellant's modified Plan.

Appellant contends that BLM's July and December 1997 decisions not to approve the two proposed plans violate the grandfathered uses provision of section 603(c) of FLPMA, which requires BLM to permit the "continuation of existing mining * * * uses * * * in the manner and degree in which [they] w[ere] being conducted on [October 21, 1976]," even where they would impair the suitability of the WSA for wilderness designation. 43 U.S.C. § 1782(c) (1994). It asserts that, "[h]istorically, Mountain States Resources [Corporation (MSRC)] maintained the mining claims now held by 3R Minerals" and that, "[f]or many years, up until approximately 1992, [MSRC] actively prospected, explored and even mined the 3R claims, removing many tons of the titanium-zirconium product." (Reply to BLM Answer at 1.) Appellant has also tendered evidence that both mining and road building activities have occurred historically in the Calf Canyon area, some of which preceded enactment of FLPMA in 1976. (Letter of June 10, 1997, from Alan K. Young, Esq., to BLM, with attachments.) Additionally, appellant notes that section 603 of FLPMA provides that, unless withdrawn from operation of the mining laws, public lands shall continue to be subject to appropriation under the mining laws during the period of wilderness review. 43 U.S.C. § 1782(c) (1994).

[1] Under section 603(c) of FLPMA, mining or mineral exploration operations on existing mining claims is permitted within a WSA, even where they would impair the suitability of the WSA for designation as wilderness when such activity constitutes the "continuation of existing mining * * * uses * * * in the manner and degree in which [they] w[ere] being conducted on [October 21, 1976]." 43 U.S.C. § 1782(c) (1994); see Committee for Idaho's High Desert, 139 IBLA at 253; Southern Utah Wilderness Alliance, 125 IBLA 175, 194, 100 I.D. 15, 25 (1993). The exception for grandfathered mining uses, however, does not apply to mining claims located subsequent to enactment of FLPMA. The Gem Shop, Inc., 136 IBLA 55, 57-58 (1996); Dave Paquin, 129 IBLA at 80; International Silica Corp., 124 IBLA 155, 159 (1992); John Loskot, 71 IBLA 165, 167 (1983). As we said in Eugene Mueller, 103 IBLA 308, 310 (1988): "The fact that there were pre-FLPMA operations on other claims which embraced the same land as [the] appellant's claims does not entitle [the] appellant to the benefit of [the] lesser [grandfathered use] standard." Appellant's mining claims at issue were located September 1, 1996. There is no evidence in the record either that appellant is the successor-in-interest to the owner of claims existing on October 21, 1976, embracing the subject tract of public lands or that grandfathered mining uses were occurring on those claims at that time. Accordingly, operations on appellant's claims are subject to the nonimpairment standard.

Thus, in order to be entitled to undertake activity in conjunction with its mining claims, appellant must demonstrate that such activity will not impair the suitability of the WSA for designation as wilderness. The Gem Shop, Inc., 136 IBLA at 57; Dave Paquin, 129 IBLA at 80; John Loskot, 71 IBLA at 167. Appellant has not done this.

With regard to appellant's contention that the BLM decisions are inconsistent with the continued applicability of the mining laws to lands under wilderness review, we note that it is well established that section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994), did in fact amend the mining law as it relates to lands within a WSA. Section 302(b) of FLPMA as codified provides that:

Except as provided in * * * section 1782 * * * of this title and in the last sentence of this paragraph [barring unnecessary and undue degradation], no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.

43 U.S.C. § 1732(b) (1994) (emphasis added). Passage of FLPMA amended the Mining Law of 1872 to the extent of precluding mining related activities on lands within a WSA which would impair the wilderness characteristics of the area except for valid existing rights and the continuation of pre-FLPMA mining activities in the same manner and degree as conducted on October 21, 1976. State of Utah v. Andrus, 486 F. Supp. 995, 1005-06 (D. Utah 1979); International Silica Corp., 124 IBLA at 159.

Appellant alleges that, "[f]or many years, up until approximately 1992," MSRC was engaged in such activity on the "mining claims now held by 3R Minerals." (Reply to BLM Answer at 1.) Appellant asserts that, by previously permitting MSRC to engage in prospecting, exploration, and mining, BLM's current decision not to allow Appellant to undertake operations because it violates the nonimpairment standard is "inconsistent with [BLM's] conduct in the past," thus rendering its present rejection arbitrary and capricious. Id. Elsewhere in the record appellant reports that MSRC, using bulldozers, drilling rigs, and trucks, excavated test pits and trenches and hauled out ore, but attributes this to the period from 1989-90, and up until the end of 1992. See Letter to BLM from appellant, dated June 27, 1997, at 1; Mining Plan at 2; Memorandum to Minerals File from DOGM, dated July 28, 1997, at 1. With respect to the asserted inconsistency by BLM, it must be recognized that prior to September 1992, when the Secretary had been scheduled to make his wilderness recommendation regarding the Carcass Canyon WSA to the President, BLM was allowed to permit exploration and other mining activity so long as the resulting impacts could be reclaimed to the point of being substantially unnoticeable in the WSA as a whole by that time and, once reclaimed, would not significantly constrain the Secretary's wilderness recommendation. 43 C.F.R. § 3802.0-5(d); see The City of St. George, 116 IBLA 230, 231 (1990). This may well explain any BLM authorization to engage in operations within the WSA. In any event, the fact that BLM permitted such activity to occur, whether or not it violated the IMP, would not justify BLM in now permitting appellant to conduct activities which would clearly violate the IMP.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

T. Britt Price
Administrative Judge